**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**FOURTH REGION**

WATCO TRANSLOADING, LLC

and

| | |
|---|---|
| UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO (LOCAL) USW 10-1 | Cases 04-CA-136562<br>04-CA-137372<br>04-CA-138060<br>04-CA-141264 and<br>04-CA-141614 |
| DENNIS ROSCOE, an Individual | Case 04-CA-138265 |

# GENERAL COUNSEL'S BRIEF IN ANSWER TO RESPONDENT'S EXCEPTIONS

Mark Kaltenbach

Counsel for the General Counsel
National Labor Relations Board, Region 4
615 Chestnut Street
Suite 710
Philadelphia, PA 19106-4413

Dated: June 14, 2017

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## I. INTRODUCTION

The Administrative Law Judge ("ALJ") determined that Watco Transloading, LLC ("Respondent") committed multiple violations of Sections 8(a)(3) and (1) of the Act, most of which were in response to an effort by its employees to form a union. Specifically, the ALJ determined that, to keep its employees from forming a union, the Respondent promised employees a raise and new equipment, instituted a new practice of buying employees a free meal every week, fired one of the two leaders of the organizing drive, John D. Peters ("Peters"), and disciplined, suspended, and fired the other leader, Dennis Roscoe ("Roscoe").

The Respondent filed numerous exceptions to the ALJ's decision. The Respondent's primary contention is that the ALJ should have credited Respondent's witnesses but did not always do so. The Respondent also claims that the ALJ at times failed to abide by Board precedent, and that proper application of that precedent would exonerate Respondent from some of the allegations against it.

Contrary to the Respondent's exceptions, the ALJ's credibility resolutions are supported by the record. Furthermore, the ALJ correctly applied Board precedent to conclude the Respondent violated the Act. Therefore, the Respondent's exceptions are without merit.

## II. ISSUES

1. Did the ALJ correctly conclude that Respondent violated the Act by promising its employees a raise to prevent them from forming a union?

   **Yes.** The credited testimony revealed that a manager asked employees why they thought they needed a union and, when the employees complained about low wage rates in response, promised to try to procure a two to three dollar per hour raise for them. This conduct unlawfully coerced employees in deciding whether to form a union.

2. Did the ALJ correctly conclude that Respondent violated the Act by indicating to its employees that Respondent would provide them with rain gear and boot slips to prevent them from forming a union?

   **Yes.** The credited testimony reveals that employees had long expressed a desire for equipment to protect them against adverse weather and that, in response to the organizing drive and just before the vote on whether to unionize, a manager collected employees' measurements and told them he was ordering such equipment for them. This conduct unlawfully coerced employees in deciding whether to form a union.

3. Did the ALJ correctly conclude that Respondent violated the Act by instituting a new practice of providing employees with a free meal every week to discourage them from forming a union?

   **Yes.** The credited testimony reveals that, in response to the employees' effort to organize a union, the employer instituted a new practice of buying the employees a free meal every week. This conduct unlawfully coerced employees in deciding whether to form a union.

4. Did the ALJ correctly conclude that Respondent violated the Act by discharging Peters because he led the effort to form a union among Respondent's employees?

   **Yes.** The General Counsel proved that Peters's initiation and leadership of the effort to form a union was a motivating factor in his discharge, and Respondent did not show that it would have discharged Peters even absent his union activity.

5. Did the ALJ correctly conclude that Respondent violated the Act by issuing two written warnings to Roscoe because he engaged in protected concerted activity?

   **Yes.** The General Counsel proved that Roscoe protesting, on behalf of Respondent's black employees, perceived discrimination based on race in Respondent's promotion and

wage decisions was a motivating factor for the two warnings, and Respondent did not show that it would have issued the warnings even absent Roscoe's protected concerted activity.

6. Did the ALJ correctly conclude that Respondent violated the Act by suspending Roscoe in the weeks leading up to and during the Board-conducted union election because Roscoe led the effort to form a union among Respondent's employees?

   **Yes.** The General Counsel proved that Roscoe's leadership of the effort to form a union was a motivating factor in his suspension, and Respondent did not show that it would have suspended Roscoe even absent his union activity.

7. Did the ALJ correctly conclude that Respondent violated the Act by discharging Roscoe because he led the effort to form a union among Respondent's employees?

   **Yes.** The General Counsel proved that Roscoe's leadership of the effort to form a union was a motivating factor in his discharge, and Respondent did not show that it would have discharged Roscoe even absent his union activity.

## III. BACKGROUND

Respondent contracts with Philadelphia Energy Solutions ("PES"), an oil refinery, to move, inspect, and perform minor repairs on oil-carrying rail cars at PES's Philadelphia, Pennsylvania location. To accomplish these services, Respondent employs conductors, engineers, and brakemen to move the rail cars from place to place within the worksite and carmen to inspect and make minor repairs on the rail cars. (ALJD at 2-3.) The present case involves an effort by the members of all of these classifications to form a bargaining unit and be represented by a union.

Brian Spiller ("Spiller") was the Terminal Manager during the union drive and when the unfair labor practices at issue here occurred (Spiller has since been promoted to a more senior management position with Respondent). Four shift supervisors worked under Spiller. (ALJD at 3.) At the relevant times, the shift supervisors were Brandon Lockley ("Lockley") (ALJD at 12),[1] Gary Plotts ("Plotts") (ALJD at 5), Joe Ryder ("Ryder") (ALJD at 7), and David James Gordon, Jr. ("Gordon") (ALJD at 4). Spiller and the shift supervisors comprised the onsite management at the Philadelphia location (ALJD at 3). In addition, Brooke Beasley ("Beasley") and Sofrana Howard ("Howard"), human resources officials at Respondent's corporate headquarters in Pittsburg, Kansas, occasionally assisted with human resources matters at the Philadelphia site. Spiller reported to Nathan Henderson, a management official located in Houston, Texas. (ALJD at 3.)

The Philadelphia worksite consisted of a parking lot at which Respondent personnel parked their personal vehicles, a network of rail tracks, and two trailers (ALJD at 2-3, 8). Employees kept their personal belongings and spent their downtime in one trailer ("employee trailer") and supervisors' offices were located in the other trailer ("supervisor trailer"). The two trailers were connected by a short elevated platform across which one could move from one trailer into the other. (ALJD at 3.)

In August 2014, a serious effort commenced among Respondent's employees to form a union (ALJD at 8). On September 2, 2014, United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO (Local) USW 10-1 ("Union") petitioned the Board for a representation election among the employees (ALJD at 12). The Board conducted the election on October 3 and 4, 2014, and a

[1] The ALJ mistakenly referred to Brandon Lockley as "Brian Lockley" (ALJD at 12).

majority of employees did not vote to authorize the Union to bargain on their behalf (ALJD at 15).

## IV. ARGUMENT

### A. Promise of a Raise

#### 1. Facts

The ALJ concluded that Respondent violated Section 8(a)(1) by promising to try to procure a raise for the employees to discourage them from forming a union. The ALJ based her findings of fact on this matter entirely on the testimony of Matthew Horne ("Horne"). The ALJ reasoned that Horne, who was Respondent's employee at the time of his testimony but was not a discriminatee with a personal financial interest in the outcome of the proceeding, had no incentive to fabricate incriminating testimony about Respondent's conduct. To the contrary, Horne put himself at risk of retaliation in his employment by testifying to incriminating statements by Spiller. Horne was therefore credible. (ALJD at 12.) The ALJ's decision to credit Horne on this basis is well-supported by Board precedent. E.g., *Stanford Realty Associates, Inc.*, 306 NLRB 1061, 1064 (1992); *Perfection Macaroni Co.*, 191 NLRB 82, 89 (1971).

According to Horne's credited testimony, in early September 2014, Spiller addressed Horne and Horne's fellow employees Marcell Salmond and Greg Baranyay in the employee trailer (Tr. 75-76). Spiller, holding a notepad, asked the employees why they would want to bring in a union and what gripes or issues the employees had (Tr. 76). In response, the employees raised a number of criticisms regarding their terms and conditions of employment, complaining of poor health benefits, the absence of sick leave, too little vacation leave, Respondent's failure to promote from within the existing work force, Respondent's failure to follow seniority in decision-making, and wage rates that were below those paid by Respondent's

competitors in the region (Tr. 76-77). As the employees voiced these concerns, Spiller wrote them down on the notepad (Tr. 76). When the employees complained of below-market wage rates, Spiller replied that he would try to procure a two to three dollar per hour raise for them (Tr. 77). The ALJ concluded that this promise to try to procure a raise violated the Act (ALJD at 12-13).

**2. Analysis**

The ALJ's conclusion that Spiller's conduct violated Section 8(a)(1) is correct. An employer who, in response to an effort by its employees to organize a union, solicits and promises to remedy employee grievances unlawfully interferes with its employees' right to decide whether to unionize. See, e.g., *Sacramento Recycling and Transfer Station*, 345 NLRB 564, 564 (2005) (manager asking drivers during a union organizing drive "why the drivers wanted a union and what it would take to make the drivers happy" a violation); *MEMC Electronic Materials, Inc.*, 342 NLRB 1172, 1192 (2004) (manager violated the Act when, in midst of organizing drive, he solicited complaints and conspicuously took notes on responses); *Maple Grove Health Care Center*, 330 NLRB 775, 775, 785 (2000) (employer violated the Act where, after learning of organizing activity, manager told employee that "he had heard that employees were having problems and he wanted to know if he could help the employees with any problems."); *Traction Wholesale Center Co., Inc.*, 328 NLRB 1058, 1058-59 (1999), enfd. in relevant part 216 F.3d 92 (D.C. Cir. 2000); *Reliance Electric Co.*, 191 NLRB 44, 44-45 (1971) (employer violated the Act when, upon learning of organizing activity, manager held meetings to hear employee complaints and promised to strive to adjust the complaints), enfd. 457 F.2d 503 (6th Cir. 1972). By such conduct, the employer is "urging on his employees that the combined

program of inquiry and correction will make union representation unnecessary." *Reliance*, above at 46.

Here, Spiller asked outright what complaints the employees had that would make them think they needed a union, conspicuously took notes when the employees made their complaints, one of which was that wage rates were too low, and promised that he would strive to get the employees a raise. By this behavior, Spiller was communicating to employees that Respondent would find out their desires and correct them itself, and a union was thus unnecessary. The Board has repeatedly held that such conduct impermissibly interferes with employees' freedom to decide whether to form a union. The ALJ's finding of a violation was therefore correct.

**3. Respondent's Exceptions**

The Respondent excepted to the ALJ's conclusion that it violated the Act in this manner. The Respondent does not dispute the ALJ's decision to credit Horne's account of what Spiller said. Instead, the Respondent posits several legal arguments as to why Spiller's statements were not unlawful. (R. Br. at 23-24.) Each lacks merit.

Respondent asserts that Spiller's actions were not unlawful because Spiller did not say that the employees would only receive raises if they abandoned their effort to form a union. However, the Board has never required that an employer explicitly condition improvements on opposition to a union to find a violation. See, e.g., *Sacramento*, 345 NLRB at 564; *Alamo Rent-A-Car*, 336 NLRB 1155, 1155 (2001); *Maple Grove*, 330 NLRB at 785; *Insight Communications Co.*, 330 NLRB 431, 455-56 (2000); *Embassy Suites Resort*, 309 NLRB 1313, 1316 (1992), enf. denied on other grounds sub nom. *Lotus Suites, Inc. v. NLRB*, 32 F.3d 588 (D.C. Cir. 1994); *Reliance*, 191 NLRB at 44-46. Instead, an employer unlawfully interferes with its employees' right to freely choose whether to form a union by soliciting complaints and promising to remedy

them in reaction to employees' union activity, even if the employer does not condition its beneficence on the employees abandoning their organizing. See ibid. The vice in such conduct is not that the employer is making a bargain with employees to keep the union out in exchange for improvements in working conditions. Rather, it is that the employer is "urging on his employees that the combined program of inquiry and correction will make union representation unnecessary"—a message that the Board has long and consistently held unlawfully coercive. E.g., *Reliance*, above at 46. This danger adheres regardless of whether the employer overtly conditions the grant of benefits on specific actions by the employees.

In addition, the Supreme Court specifically rejected Respondent's exact argument in *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 408, 409-410 (1964). The Court identified the "danger inherent in well-timed increases in benefits [to be] the suggestion of a fist inside the velvet glove"—in other words, by granting benefits in response to a union drive, an employer sends a message to employees "that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." Id. at 410. The Court observed that the coercive threat implicit in a grant of benefits exists even for "benefits [that] are conferred permanently and unconditionally," because employees understand that the employer controls the grant of "additional benefits or renegotiation of existing benefits…in the future."[2] Id. at 409-10.

[2] Indeed, in *Exchange Parts*, the Fifth Circuit Court of Appeals had determined that the employer's grant of benefits during an organizing campaign was lawful because "the benefits were put into effect unconditionally on a permanent basis, and no one has suggested that there was any implication the benefits would be withdrawn if the workers voted for the union"—the exact same argument the Respondent makes now. *Exchange*, above at 408 (internal quotation marks omitted). The Supreme Court rejected this reasoning and reversed the lower court. Id. at 409-10.

In summary, extant law identifies two coercive messages inherent in a promise of benefit in response to an organizing drive: (1) that employees do not need a union because the employer will solicit their complaints and solve them on its own, *Reliance*, above at 46; and (2) that the employer controls the employees' terms and conditions and can take away just as easily as it can give, *Exchange Parts*, above at 409-10. Both coercive messages are communicated regardless of whether the benefits are conditioned on union opposition. Therefore, Respondent's argument that Spiller's conduct was not unlawful because he did not tell employees he would procure them a raise only if they abandoned their efforts to unionize is meritless.

Respondent cites *Hampton Inn NY-JFK Airport*, 348 NLRB 16 (2006), to support its argument that Spiller's statements were lawful because he did not overtly condition improvements on union opposition, but that case does not stand for any such principle (R. Br. at 24). Instead, in *Hampton Inn*, the Board reaffirmed the existing principle that, for a promise of benefits to violate Section 8(a)(1), "it must be made in specific response to organizing" and that therefore "employer knowledge of union activity is an essential element of this 8(a)(1) violation." Id. at 18. Because the employer in *Hampton Inn* had no knowledge of union activity at the time it made a promise of benefits, it did not violate the Act. Ibid. Here, in contrast, Respondent undisputedly knew that its employees were attempting to form a union and undertook the solicitation and promise to try to procure a raise "in specific response" to that organizing. Ibid. Indeed, Spiller opened the meeting in question by asking the employees why they thought they needed a union. Thus, the ALJ's finding of a violation is entirely consistent with *Hampton Inn*.

Respondent also argues that Spiller's actions were lawful because he never said that the employees would receive a raise, only that he would try to get them a raise (R. Br. at 24). Rejecting this same argument, the Board explained:

> While the management officials, who conduct the May meetings, phrased their replies to some of the complaints in such circumspect terms as undertaking to "look into" or "review" them, or could not recall whether they made a similar response to other complaints, such cautious language, or even a refusal to commit Respondent to specific corrective action, does not cancel the employees' anticipation of improved conditions if the employees oppose or vote against the unions.

*Reliance*, 191 NLRB at 46; accord *MEMC*, 342 NLRB at 1192 ("A violation is established even if the employer does not actually promise to remedy the problems, but rather only to consider and try to correct the sources of employee dissatisfaction.") (internal quotation marks omitted); *Bakersfield Memorial Hospital*, 315 NLRB 596, 600 (1994) (solicitation of grievances "clearly does violate the Act whenever coupled with an express or implied promise to, at least, consider and try to correct the sources of employee dissatisfaction"); see also *Flamingo Hilton-Laughlin*, 324 NLRB 72, 108-09, 112-13 (1997) (violation where, in response to union organizing, managers asked employees about work problems and told employees they would "try" to fix the problems raised), enfd. in relevant part 148 F.3d 1166 (D.C. Cir. 1998). Here, Spiller promised to try to get employees a two to three dollar per hour raise for the purpose of impressing upon them that Respondent was going to increase their pay on its own and that the employees therefore did not need a union. That he used "cautious language…does not cancel" the coercive nature of his message. *Reliance*, above at 46. Respondent's argument is without merit.

Respondent additionally argues that the "ALJ erred in finding that Spiller promised employees a raise…in response to union organizing because the preponderance of the evidence shows that Spiller had requested a salary survey prior to the union organizing" (R. Br. at 5).

Respondent never explains why it believes Spiller asking Respondent to conduct a salary survey at some point prior to the union drive is relevant to the lawfulness of his solicitation of employees' reasons for desiring a union and promise to try to adjust one of those reasons by procuring a two to three dollar per hour raise for employees (R. Br. at 5, 23-24). There is no discernible reason why such a request would render Spiller's later conduct lawful. [3]

Finally, Respondent argues that "there is no evidence of record that Respondent made any changes—let alone significant changes—to its past manner and method of soliciting grievances" (R. Br. at 24). "The Respondent's contention is based on a misapprehension of Board policy." *Manor Care Health Services—Easton*, 356 NLRB 202, 220 (2010), enfd. per curiam 661 F.3d 1139 (D.C. Cir. 2011) (summary enforcement because employer conceded this violation). It is true "that an employer who has had a past practice and policy of soliciting employee grievances may continue to do so during an organizational campaign," provided the employer does not "significantly alte[r] its past manner and methods of solicitation during the union campaign." *House of Raeford Farms, Inc.*, 308 NLRB 568, 569 (1992). The Board explained:

> The point of the "past practice" exception for solicitation of grievances is that the solicitation is not reasonably perceived as an implied promise to remedy grievances to discourage union representation when it is merely the continuation of business as usual for employer and employee. In other words, because it is an ongoing practice, and would be expected to have occurred without regard to the union campaign, the solicitations will not reasonably be perceived as a change in

[3] The ALJ made no finding one way or the other as to whether Spiller ever requested that Respondent conduct a survey of area pay rates. To support its claim that Spiller did make such a request, Respondent incorrectly asserts that Horne testified that Spiller mentioned previous efforts to obtain a raise for the employees (R. Br. at 23-24). Horne gave no such testimony; the portions of the transcript Respondent cites to support its untrue claim to the contrary do not include any of Horne's testimony. Instead, Horne's credited testimony was only that, after Spiller solicited employees' reasons for desiring a union and employees complained about below-market wage rates, Spiller said "he would try to get two to three dollars an hour" (Tr. 77).

> practice and policy designed to interfere with employees' choice of whether or not to select union representation.

*Manor Care*, above at 221. "That defense is not satisfied where, as here, in the midst of a union campaigning, the employer holds meetings where it explains to employees that they don't need a union and that we can 'fix' your problems without a union." Ibid. In other words, an employer who solicits grievances for the stated purpose of finding out why employees are considering a union and then promises to remedy those grievances on its own so as to convey to the employees that a union is unnecessary cannot avail itself of the past practice exception. Ibid. "[T]he expressed antiunion rationale for the promise to remedy employee grievances makes [such] meetings fundamentally different from anything conducted by the Respondent in the past." Ibid.; accord *Aldworth Co.*, 338 NLRB 137, 179, 186, 191 (2002), enfd. 363 F.3d 437 (D.C. Cir. 2004); *Edward A. Utlaut Memorial Hospital*, 249 NLRB 1153, 1156 (1980).

In the present case, Spiller approached employees and asked what complaints made them desire a union, conspicuously took notes as employees voiced their complaints, then promised to try to resolve one of the complaints, namely that wages were too low. Thus, Spiller sought to determine why employees wanted a union and to convey to employees that Respondent would fix the problems without a union. This unlawfully interfered with employees' freedom to choose whether to form a union regardless of Respondent's past solicitation practice. *Manor Care*, above at 220-22; *Aldworth*, above at 179, 186, 191; *Utlaut*, above at 1156.

In summary, the ALJ correctly concluded that Spiller's conduct violated Section 8(a)(1) of the Act. Respondent's exception to this conclusion is without merit.

## B. Promise of Rain Gear and Boot Slip-ons

### 1. Facts

The ALJ determined that Respondent violated Section 8(a)(1) by telling employees, after the petition was filed and a few weeks before the election, that Respondent would provide them with rain gear and boot slip-ons. Here again, the ALJ based her findings of fact entirely on Horne's testimony, which she credited for the same, Board-endorsed reasons already discussed (ALJD at 12-13). E.g., *Stanford*, 306 NLRB at 1064; *Perfection*, 191 NLRB at 8.

Horne testified that on September 16 or 17, 2014, in the employee trailer, Spiller asked employees Mike, Joe, and Kevin Onuskanych, Marcell Salmond, Lou Gentile, Greg Baranyay, and Horne to write down their sizes for rain gear and boot slip-ons so that Spiller could purchase them. Supervisor Lockley was also present. (Tr. at 77-78.) The employees asked for heavy gloves and hats or face masks for the winter as well, and Spiller responded that he would do his best to get them for the employees (Tr. at 78-79). Spiller then asked the employees what gripes or issues they had and what Spiller could do to resolve them (Tr. at 79). In response, the employees complained that their wage rates were too low, their health benefits cost too much for too little coverage, they had no sick leave, they had too little vacation leave, seniority was not followed, the Respondent relied on outside hiring instead of promoting current employees, and supervisors were out of control (Tr. at 79-80). Spiller told the employees that he would do his best to remedy their grievances (Tr. 81).

Horne responded that it would be no problem to resolve the grievances when the employees designated the union to represent them (Tr. 81). Spiller replied that he, Spiller, would not be negotiating on behalf of Respondent in the event employees unionized and told the employees about a Respondent facility where employees unionized then went years without a

collective bargaining agreement and another Respondent facility where employees had relatively low wage rates (Tr. 81-82).

Horne also testified that he and other employees attended "safety meetings" conducted by Respondent in May, June, and July of 2014, before the employees began organizing a union (Tr. 86). At some of these meetings, employees requested rain gear, boot slip-ons, and other protective clothing and equipment (Tr. at 86, 91). At that time, Spiller told the employees that he was working to get the requested items (Tr. at 91).

**2. Analysis**

The ALJ correctly concluded that Spiller asking employees, shortly before the union election, to write down their sizes for adverse weather equipment so that he could order it violated Section 8(a)(1). "[A]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act." *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 7 (2015) (internal quotation marks omitted).

Here, at a time when there was no union organizing taking place, multiple employees asked Spiller for clothing and equipment that would increase their comfort and make it easier for them to perform their jobs in adverse weather conditions. Spiller told the employees that he was working to get it, but there is no other evidence that he actually took any action to address the employees' requests. (Tr. at 86, 91.) Then, just over two weeks before the employees were scheduled to vote on whether to form a union, Spiller approached employees and announced that he needed their measurements so that he could order the equipment they had asked for months earlier (Tr. at 77-78). Respondent has not even tried to establish a legitimate business reason for the timing of Spiller's conduct (see R. Br. at 23-24). Therefore, because there has been no

"showing of a legitimate business reason for the timing" of the grant of the rain gear and boot slip-ons just before the union vote, "the Board will infer improper motive and interference with employee rights under the Act." *Sister's*, above, slip op. at 7. The ALJ correctly concluded that Spiller's conduct constituted unlawful interference with employees' freedom to choose whether to form a union.

### 3. Respondent's Exceptions

Respondent excepted to this conclusion on a number of grounds. First, as with Spiller's promise to try to procure a raise for employees, Respondent claims that Spiller did not overtly condition provision of the adverse weather gear on employees' abandoning their efforts to unionize (R.Br. at 24). This argument founders here for the same reason it did previously. An employer may unlawfully interfere with its employees' right to choose whether to bargain collectively by granting the employees a benefit even if the benefit is not conditioned on opposing the union. E.g., *Exchange Parts*, 375 U.S. at 408, 409-10; *Insight*, 330 NLRB at 455-56; see also *Comcast Cablevision of Philadelphia*, 313 NLRB 220, 250 (1993) (employer violated the Act by announcing one week before an election that a benefit would be granted to employees even though did not condition benefit on union activity).

Next, Respondent asserts that "contrary to the ALJ's findings, there is no evidence that Respondent indicated that employees '*would* receive'…rain gear and boot slips," declaring that "the ALJ did not provide any cite to the record in support of this finding" (R. Br. at 24, 24 fn. 5). Respondent's claim is not true. Horne, whose testimony the ALJ credited and relied upon entirely with regard to this violation (ALJD at 12-13), said that, on September 16 or 17, 2014, Spiller approached a group of employees and "asked us to fill out a sheet with the sizes for rain gear and boot slip ons for the winter time," telling the employees that "[h]e wanted us to put our

sizes down so that he could order" (Tr. at 78). By this conduct, Spiller not only indicated to employees that they would be receiving the adverse weather gear, he took the concrete step of obtaining the employees' measurements, which would have impressed upon the employees that he seriously intended to give them the benefit. Respondent's assertions are wrong.

Respondent also suggests that Spiller telling employees prior to the union drive that he was working to get them adverse weather gear somehow renders his conduct on September 16 or 17 lawful (see R. Br. at 23-24). Respondent offered no evidence that Spiller actually took any action to obtain such gear prior to the employees' effort to form a union; although Respondent called Spiller as a witness, he was not asked to testify regarding the rain gear and boot slip-ons. An employer unlawfully interferes with its employees' right to choose whether to unionize when, shortly before a union election, it grants a benefit that "responds to a request made by employees well before the organizing campaign." *Caterpillar Logistics, Inc.*, 362 NLRB No. 49, slip op. at 9 (2015), enfd. 835 F.3d 536 (6th Cir. 2016); accord, *Comcast Cablevision*, above at 250-51 (employer violated the Act where "there is no probative evidence that previously expressed wishes of the employees for direct deposit would have been granted absent the Teamsters' campaign here"); *R. Dakin & Company*, 284 NLRB 98, 98-99 (1987); *Delta Data Systems*, 279 NLRB 1284, 1291 (1986) ("The testimony is convincing that whatever was discussed back in 1981 was neither put in writing nor scheduled to be implemented at any specific future date. It was revived only because the union organization drive began."). An employer's grant of a benefit that was discussed with employees before the union campaign but not previously acted upon is no less coercive than one not discussed previously. Ibid.; accord, *Rodeway Inn*, 228 NLRB 1326, 1327-28 (1977) (where employees had complained about not receiving free lunches and manager had indicated to employees that she was working on getting them free lunches,

employer violated the Act by granting the free lunches in response to an organizing drive). Here, to dissuade employees from unionizing, Spiller addressed an employee concern raised months earlier and theretofore ignored. His conduct violated the Act.[4]

### C. Purchasing Meals

#### 1. Facts and Analysis

The ALJ concluded that Respondent violated Section 8(a)(1) by providing employees with free meals in order to discourage their effort to form a union. Here again, the ALJ credited Horne (ALJD at 13). Respondent hired Horne on May 28, 2014 (Tr. at 73). According to Horne, from that date until the union campaign began in earnest—a period of more than two months—Respondent bought Horne and his co-workers lunch only on one or two occasions. After the effort to form a union began, however, Respondent purchased employees lunch once per week. (Tr. at 82.) Respondent has not offered a "legitimate business purpose" for granting this new benefit during the employees' organizing drive, and so "the Board will infer improper motive and interference with employee rights under the Act." *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 7. The ALJ correctly concluded that the Respondent violated the Act by providing employees a weekly complimentary meal to discourage them from forming a union.

[4] In its list of exceptions, Respondent asserts that the ALJ erred in concluding that Spiller's adverse weather gear announcement violated the Act "because the preponderance of the evidence shows…that rain gear was normal seasonal uniform equipment" (R. Br. at 5). However, the record is clear that Respondent had not provided this equipment before Spiller took the employees' measurements to order it just before the union election—otherwise, Respondent would not have had to order the gear because it would have already had it. Moreover, employees were requesting the gear in May, June, and July of 2014, establishing that Respondent had not previously provided it (Tr. at 86, 91). Therefore, before the employees' effort to form a union, rain gear was not "normal seasonal uniform equipment" at Respondent's facility. Instead, it was a new benefit provided to employees for the first time to undermine their organizing drive.

### 2. Respondent's Exceptions

Respondent excepts to this conclusion. Its principal contention is that the ALJ should have credited Respondent's witness Spiller instead of Horne (R. Br. at 25). Spiller testified that Respondent always provided meals at employee meetings and that it did not hold meetings more frequently after the union drive began (Tr. at 679-80). The Board does not overrule an ALJ's credibility resolutions unless the clear preponderance of all of the relevant evidence convinces the Board that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). As already explained, the ALJ's decision to credit Horne is grounded in logic long approved by the Board. E.g., *Stanford Realty*, above at 1064; *Perfection Macaroni*, above at 8. Meanwhile, Respondent's only argument as to why the ALJ's decision to credit Horne was incorrect is that "Horne had only been employed with Respondent three months when the union activity began" so "his ability to testify as to Respondent's past practice is significantly limited" (R. Br. at 25). However, two to three months is long enough to ascertain that Respondent did not have a practice of providing a free meal every week until the employees began to organize a union. Therefore, the ALJ's decision to credit Horne to determine that the Respondent implemented a new benefit is reasonable.

In the alternative, Respondent argues that, even if it did begin buying employees lunch each week in response to the union drive, this practice did not constitute a benefit to employees (R. Br. at 25). To ascertain whether an employer's action constitutes a benefit to employees, the "relevant inquiry is whether the employees reasonably would view it as a benefit to them." *Durham School Service, L.P.* 360 NLRB 708, 709 (2014) (internal quotation marks and brackets omitted); *Sun Mart Foods*, 341 NLRB 161, 163 (2004). Respondent's employees would "reasonably" view being provided with a complimentary meal every week, which conferred a

concrete and substantial financial value to the employees, "as a benefit to them." *Durham*, above at 709. In fact, the Board has recognized that regularly providing free meals in response to an organizing drive interferes with employees' right to freely choose whether to be represented by a union. *Rodeway*, 228 NLRB at 1327-28. The Respondent's argument that providing employees a free meal every week in response to the union drive did not constitute a benefit to the employees is without merit.[5]

### D. Discharge of John D. Peters

#### 1. Introduction

The ALJ concluded that Respondent discharged Peters because of his union activity in violation of Sections 8(a)(3) and (1) of the Act (ALJD at 9-10). The Act "makes unlawful the discharge of a worker because of union activity." *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 394 (1983) (citing 29 U.S.C. Secs. 158(a)(1), (3)). In other words, under Sections 8(a)(3) and (1), an employer commits an unfair labor practice if a causal relationship exists between an employee engaging in union activity and the employee's termination. See ibid. In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board set forth a framework "to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of their employer which detrimentally affect such employees' employment." Id. at 1089.

Under *Wright Line*, the General Counsel must prove "that an employee's protected conduct was a motivating factor in an employer's decision to take adverse action against the

[5] Respondent also argues that, because it did not condition the free meals on opposition to the union, this benefit did not interfere with employees' rights under the Act—the same argument it raised in defense of its promise to procure a raise and its announcement that it would provide employees with adverse weather equipment (R. Br. at 5, 25). This argument fails here for the reasons previously discussed. E.g., *Exchange*, 375 U.S. at 408-10; see also *Reliance*, 191 NLRB at 46.

employee." *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011); accord, *Wright Line*, above at 1089. "The elements commonly required to support a finding of discriminatory motivation are union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer." *Mesker*, above at 592 (citing *Williamette Industries*, 341 NLRB 560, 562 (2004)).

"Once the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove as an affirmative defense that it would have taken the same action even if the employee had not engaged in the protected activity." *Adams & Associates, Inc.*, 363 NLRB No. 193, slip op. at 6 (2016) (citing *Manno Electric*, 321 NLRB 278, 283 fn. 12 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997)).

Here, the ALJ correctly determined (1) the evidence established the elements necessary to prove that Peters's initiation of an effort to form a union motivated Respondent to discharge him and (2) Respondent did not prove that it would have taken the same action had Peters not launched the organizing drive.

**2. The General Counsel's Initial Showing**

**a. Union Activity**

The ALJ found that Peters and Roscoe spearheaded the effort among Respondent's employees to form a union (ALJD at 8). Peters contacted the Union on August 21, 2014 (Tr. at 130-32), invited union representatives to come talk with employees in the parking lot at Respondent's worksite that same day (Tr. at 132-33), alerted all of Respondent's employees that the meeting would take place (Tr. at 133), actually attended the meeting and spoke in support of union representation during it (Tr. at 97), and passed out cards authorizing the union to bargain on behalf of employees from August 21 until Respondent discharged him a few days later (Tr. at 136, 138-39). Peters also openly advocated for forming a union among the employees (Tr. at

132, 138-39. In short, as one of the two employees responsible for instigating the organizing drive, Peters engaged in extensive union activity in the days before his discharge. The evidence establishes this first element needed to prove that union activity was a motivating factor in Peters's discharge. *Mesker*, above at 592.

**b. Respondent's Knowledge of That Activity**

The Respondent knew that Peters was the initiator and leader of a burgeoning effort among its employees to form a union at the time it discharged him on August 26, 2014. The ALJ concluded that multiple supervisors observed the meeting with the union representatives in the employee parking lot on the afternoon of August 21, 2014 (ALJD at 8). In addition, Spiller himself testified that, on August 24, 2014, supervisors observed Peters (along with Roscoe) in the parking lot handing out authorization cards and alerted Spiller the following day (Tr. at 655).[6]

Furthermore, prior to any of these events, Spiller told supervisor Gordon that Peters might attempt to form a union and that Gordon should keep an eye out for signs that a union drive might be underway and convey to employees Gordon's own negative views of unions (ALJD at 4).[7] Thus, to Spiller, Peters leading a meeting of employees with union officers and handing out authorization cards was the fruition of a long-held concern.

Respondent disputes that it knew of Peters's union activity when it decided to discharge him. The Respondent argues that it decided to fire Peters on August 19, 2014, before Peters organized the meeting with the Union on August 21. The only evidence that the decision to discharge was made on August 19 is the discredited testimony of certain of Respondent's

[6] Thus, Respondent concedes that a manager responsible for terminating Peters knew that Peters was leading a unionization effort before Respondent discharged Peters.

[7] The ALJ credited Gordon's testimony as to these statements by Spiller, and the Respondent did not except to the ALJ's decision to do so.

witnesses—namely, Beasley, Howard, and Spiller. Therefore, as Respondent acknowledges, for its argument to succeed, the Board will have to overturn the ALJ's credibility resolutions. (R. Br. at 18-19.)

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the relevant evidence convinces the Board that they are incorrect. *Standard Dry Wall,* 91 NLRB at 545. The ALJ's decision to discredit the testimony of Beasley, Howard, and Spiller that the decision was made to discharge Peters during a conference call on August 19 is supported by the record. The Respondent introduced no documentary evidence, such as notes, memoranda, e-mails, and the like, as to what occurred during the August 19 call. If the managers had in fact made the significant decision to discharge Peters during this call, some sort of contemporaneous written record of that decision would be expected, yet the Respondent produced none.

In addition, the managers' claim that they decided to discharge Peters on August 19 is inconsistent with the fact that Peters was not actually discharged until August 26, a full week later. The Respondent's explanation for this delay is that the managers decided on August 19 that human resources representative Beasley should be present for the discharge meeting and that Beasley could not fly to Philadelphia from corporate headquarters in Kansas until August 25. The Respondent did not offer any reason for supposedly thinking that a human resources official needed to be present at the discharge meeting. There is no evidence of any Respondent policy requiring such a representative to be present. And, when Respondent discharged Roscoe in October 2014, it not only did not fly a human resources representative to the worksite, it actually told Roscoe he was fired via e-mail, without any sort of meeting (ALJD at 15). The

Respondent's explanation for the week-long delay between its purported decision to discharge Peters and the discharge itself does not withstand scrutiny.

Furthermore, the Respondent permitted Peters to continue working normally between August 19 and August 26. If, as the managers claimed, they decided on August 19 that Peters engaged in discharge-worthy misconduct, logically they would not have permitted him to continue to work as though nothing were wrong for an additional week. They would either have discharged him immediately or, if for some reason they could not do that, they would have suspended him until they could do so. The Respondent did neither. It is not plausible that Respondent permitted Peters to continue working for a full week after deciding to terminate him for serious misconduct.

Finally, as discussed more fully below, Respondent's ostensible lawful reason for discharging Peters is pretextual. That Respondent did not discharge Peters for the misconduct it claims it did further discredits its managers' testimony that they decided to discharge Peters for that misconduct on August 19. Put another away, because Respondent did not decide to discharge Peters for the misconduct in question at all, it necessarily did not decide to do so on August 19.

In conclusion, the clear preponderance of the relevant evidence does not show the ALJ's decision to discredit Beasley, Howard, and Spiller's testimony to have been incorrect. *Standard Dry Wall*, above at 545. Instead, the ALJ's credibility resolution is logical and supported by the evidence.[8]

[8] In addition, the Respondent inaccurately asserts that the ALJ's discrediting of Beasley, Howard, and Spiller on this point was not "based on the demeanor of the witnesses" (R. Br. at 18). However, although the ALJ did not discuss demeanor in her specific analysis as to why she found the testimony of these witnesses incredible (ALJD at 7, 9-10), she did state generally that

The evidence therefore shows that the Respondent knew about Peters's union activity when it decided to fire him. The second element needed to establish a causal relationship between that activity and Peters's discharge is established.

### c. Antiunion Animus

The final element necessary to prove that Peters's initiation and leadership of the incipient union drive motivated Respondent to discharge him is antiunion animus by Respondent. *Mesker*, 357 NLRB at 592. The evidence amply establishes such animus.

#### i. Direct Evidence

There is direct evidence that Spiller was averse to Peters in particular attempting to form a union. As stated earlier, Gordon, who worked under Spiller as a supervisor, gave credited testimony that on several occasions from May to August 2014 Spiller told Gordon that there was "union talk" among the employees and that Peters was the ring leader, and instructed Gordon to keep his "ear to the ground" for organizing activity and to share Gordon's antiunion views with employees (ALJD at 4; Tr. at 107-08, 109-10, 111-12). Where an employer's supervisors discuss an employee's union activity with one another in a hostile way, the discussion is "direct evidence of antiunion animus." *The Fund for The Public Interest*, 360 NLRB 877, 877 fn. 1, 884 (2014). Spiller's expressions of concern to Gordon that Peters would attempt to organize the employees into a union and instructions that Gordon look out for signs that Peters was doing so and preemptively discourage employees from unionizing therefore constitute direct evidence of Respondent's animus toward the formation of a union and specifically toward Peters instigating such formation. See ibid.

---

her findings of fact were at least partially based on her "observation of the demeanor of the witnesses" (ALJD at 2).

### ii. Timing

Respondent's antiunion animus is further established by the close timing between Respondent learning that Peters was taking concrete steps toward forming a union and his discharge. E.g. *Schaeff Incorporated*, 321 NLRB 202, 217 (1996), enfd. 113 F.3d 264 (D.C. Cir. 1997) (where employees were terminated "within days" of engaging in protected conduct, this "alone…suggest[ed] antiunion animus [w]as a motivating factor" in their discharges) (internal quotation marks omitted). Peters arranged for employees to meet with the union in the parking lot on August 21, 2014, a Thursday, an event observed by the Respondent; the Respondent witnessed him soliciting union authorization cards from his coworkers in the parking lot on August 24, a Sunday; and by August 26, a Tuesday, Respondent had fired him. Thus, Peters initiated a union drive in earnest and was fired in less than a week. The extremely close timing between Peters's union activity and his discharge gives rise to a powerful inference that the former caused the latter. Ibid.

### iii. Unlawful Interference With Employees' Decision Whether to Form a Union

Respondent's antiunion animus is also demonstrated by the violations of Section 8(a)(1) already discussed—namely, Spiller soliciting employees' reasons for desiring a union and promising to try to get them a two to three dollar per hour raise, Spiller announcing that employees would be receiving adverse weather equipment, and Respondent instituting the new benefit of a free meal once per week, all in response to the organizing drive among the employees. Respondent's unlawful interference with its employees' right to decide whether to form a union demonstrates its hostility to unionization and toward Peters's spearheading of the unionization effort. See, e.g., *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 203 (2007), enfd. 519 F.3d 373 (7th Cir. 2008).

### iv. Pretextual Nature of Respondent's Stated Reason for Discharging Peters

Finally, Respondent's animus is shown by the pretextual nature of its stated reason for discharging Peters. "It is well settled that when a respondent's stated reasons for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." *Suburban Electrical Engineers/Contractors, Inc.*, 351 NLRB 1, 5 (2007) (citing *Loudon Steel*, 340 NLRB 307, 312 (2003)). "'Such an inference is consistent with the general principle of evidence law that the factfinder is entitled to consider a party's dishonestly about a material fact as "affirmative evidence of guilt."'" *Loudon*, above at 312 (quoting *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000)). "'Moreover, once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation, especially since the employer is in the best position to put forth the actual reason for its decision.'" Ibid.

*Disparate Treatment*

Respondent claims to have discharged Peters because he harassed another employee, Curtis Pettiford ("Pettiford"). The evidence establishes that Respondent did not actually discharge Peters for this reason. The falsity of Respondent's stated reason for the discharge is evidenced first by the fact that it reacted to comparable misconduct committed by another employee around the same time with indifference. On August 1, 2014, employee Leroy Henderson, who was to relieve Peters, called out sick. Peters called Henderson to try to get him to come in because Peters had just worked a 12-hour shift and dreaded the prospect of having to work another 12-hour shift immediately thereafter. Soon after this phone call, Henderson sent Peters a series of intensely vitriolic text messages. (ALJD at 5.) The text messages are laced with profane language, contain personal insults toward Peters, and threaten violence against

Peters. For instance, Henderson texted Peters to "SHUT THE FUCK UP AND MIND YOUR OWN FUCKING BUSINESS. better [sic] yet go and bury you [sic] fucking head under a fucking rock. You fucking drunk…I shocked [sic] that no one has punched you the fuck out. Fuck you John Peters and go the fuck to hell." (GC Exh. 20.)

Peters showed these messages to Plotts, the supervisor on duty. Later that same evening, Henderson arrived at the worksite inebriated. Plotts instructed him to meet with Plotts and Peters, and Henderson refused Plotts's instruction. The following day, Peters reported the incident to Spiller and to Respondent's human resources department, including by sending them the text messages sent by Henderson (Tr. at 174-75). The Respondent took no disciplinary action of any kind against Henderson for these events. (ALJD at 5.)

Respondent's claim that it discharged Peters because of his harassment of a coworker is not consistent with its failure to take any disciplinary action against Henderson for his profane threats of violence and personal attacks against Peters, which Peters reported to Respondent only a few days before Pettiford reported Peters's alleged harassment. Where an employer treats a union supporter's misconduct far more harshly than it treats comparable misconduct by other employees, it gives rise to an inference that the union supporter's union activity was the true cause of the employer's action. See, e.g., *Lucky Cab Company*, 360 NLRB 271, 274 (2014). Respondent's disparate treatment of Henderson and Peters reveals its asserted nondiscriminatory reason for discharging Peters to be pretext.

In addition, the record reveals that employees routinely made taunts pertaining to one another's sexuality at Respondent's worksite (Tr. at 112-13), that Spiller and other supervisors observed this conduct (Tr. at 112-13, 223), and that neither Spiller nor any other manager ever instructed employees not to engage in such taunts or disciplined any employee for doing so (Tr.

at 112-13, 223). Respondent's professed sudden intense concern for conduct that it had long condoned further suggests that the concern is a pretext designed to shield Respondent's true motivation. *Superior Coal Co.*, 295 NLRB 439, 451-52, 452-53 (1989).

*The Respondent's Failure to Adhere to Its Own Disciplinary Policies*

Furthermore, Respondent failed to follow its progressive disciplinary policy with regard to Peters. Respondent maintained a written policy declaring Respondent's adherence to progressive discipline (GC Exh. 43). Nevertheless, the Respondent discharged Peters on August 26, 2014 even though he had never been disciplined before (ALJD at 10) and was considered an excellent employee by the Respondent (and specifically by Spiller) (Tr. at 108-09). The Respondent disregarding its published progressive discipline policy and firing Peters for his first instance of alleged misconduct suggests Respondent had an ulterior motive for wanting Peters out of its employees' ranks. E.g., *Aliante Casino and Hotel*, 364 NLRB No. 78, slip op. at 1 (2016); *Tubular Corporation of America*, 337 NLRB 99, 99 (2001).

*The Respondent's Investigation*

Respondent's asserted reason for discharging Peters is further belied by the bizarre manner in which its investigation into Peters's alleged misconduct proceeded. Pettiford complained to the Respondent about Peters's purported harassment on August 4 and identified a long list of employees whom he said witnessed Peters harass him (ALJD at 5-6). On August 4 and 5, Beasley called some of these witnesses. She also called Peters himself on August 5. Beasley then stopped her investigation without contacting the remaining individuals Pettiford claimed witnessed Peters's misconduct. Other than scheduling Peters and Pettiford on different shifts from one another, Respondent took no additional action until it discharged Peters 21 days

later, on August 26, ostensibly based on what it learned on August 4 and 5. (ALJD at 6.) In the meantime, Peters continued to work normally.

It is not plausible that Respondent concluded on August 5 that Peters engaged in discharge-worthy misconduct and then took no action against him for a full three weeks. If, as Respondent claims, it knew Peters engaged in misconduct warranting summary firing on August 5, it surely would have taken action against him with more haste. The very long delay between Respondent ostensibly discovering Peters's misconduct and Respondent discharging Peters for that misconduct further shows that the misconduct was not the reason for the discharge but rather an excuse for it.

That Respondent did not truly discharge Peters for his purported harassment of Pettiford is further established by its hasty effort to bolster its evidence of such harassment after it had already discharged Peters (ALJD at 6-7). Again, Respondent discharged Peters on August 26. On August 28, Beasley called six additional employees to ask them whether they had ever seen Peters engage in the misconduct for which he had supposedly been discharged two days earlier. In addition, Respondent prepared a report on its investigation for the first time on August 29, when Peters had already been fired for three days. (ALJD at 8-9; R. Exh. 4.) Respondent's post hoc scramble to find additional evidence of wrongdoing on the part of Peters as well as to make a record of its purported nondiscriminatory reasons for discharging him suggests a cover up—Respondent was clambering to make its excuse for discharging Peters plausible.

In summary, the record shows Respondent's claim to have discharged Peters because he harassed Pettiford to be untrue. Respondent's dissembling with respect to its reasons for firing Peters "warrant[s] an inference that the true motive is an unlawful one that the respondent desires to conceal," *Suburban*, 351 NLRB at 5, and constitutes "affirmative evidence of guilt," *Loudon*,

340 NLRB at 312. The pretextual nature of Respondent's asserted reasons for discharging Peters further establishes its animus toward employees' forming a union and toward Peters's role as initiator and leader of the unionization effort.[9]

### 3. The Respondent's Affirmative Defense

The evidence therefore establishes that Peters's instigation and leadership of the nascent organizing drive was a motivating factor in his discharge. Ordinarily at this stage, "the burden of persuasion shifts to the employer to prove as an affirmative defense that it would have taken the same action even if the employee had not engaged in the protected activity." *Adams*, 363 NLRB No. 123, slip op. at 6. To establish this affirmative defense, it is not enough for an employer to show that it "*could* have discharged" the employee for a nondiscriminatory reason. *Metropolitan Transportation Services, Inc.*, 351 NLRB 657, 659 (2007) (emphasis in original). Instead, "[t]he question…is whether [the employer] has gone beyond merely articulating a legitimate reason for the discharge and shown by a preponderance of the evidence that it did, in fact, rely on that reason." Ibid. "[I]f the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected

[9] Chairman Miscimarra believes that "under *Wright Line*, the General Counsel must establish a link or nexus between the employee's protected conduct and the employer's decision to take the employment action alleged to be unlawful." *Tschiggfrie Properties, Ltd.*, 365 NLRB No. 34, slip op. at 1 fn. 1 (2017) (Miscimarra, concurring). Such a link or nexus is established here by the following facts: (1) Spiller made statements to supervisor Gordon indicating the former's fear that Peters specifically would lead a union drive, (2) the Respondent engaged in multiple unfair labor practices to thwart the organizing drive that Peters initiated and led, (3) Peters was discharged less than a week after taking concrete steps toward organizing a union, and (4) the Respondent's stated reasons for discharging Peters were pretexts. There is therefore an abundance of evidence to show the Respondent's hostility to Peters's protected conduct in particular. This is not a case where the General Counsel is relying on evidence unrelated to Peters's situation to demonstrate animus. Even under the Chairman's view, the General Counsel proved that Peters's union activity motivated his discharge. See ibid.

conduct." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). As the Board explained in *Limestone*, "a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone*, above at 722.

As already explained, the evidence reveals that the Respondent did not rely upon allegations of misconduct on the part of Peters in deciding to discharge him. Instead, those allegations were nothing more than an excuse used by Respondent to conceal its true, unlawful motive. Therefore, Respondent necessarily cannot "sho[w] by a preponderance of the evidence that it did, in fact, rely on" those allegations in terminating Peters, which is what Respondent would have to show to establish this affirmative defense. *Metropolitan*, above at 659.

### E. Issuance of Disciplinary Warnings to Roscoe

#### 1. Introduction

The ALJ concluded that Respondent violated the Act by issuing two disciplinary warnings to Roscoe on August 21 because he engaged in protected concerted activity. "An employer violates Section 8(a)(1) of the Act by taking adverse action against employees because of their protected concerted activities." *Amglo Kemlite Laboratories, Inc.*, 360 NLRB 319, 325 (2014), enfd. 833 F.3d 824 (7th Cir. 2016). "By its terms, *Wright Line* applies to 8(a)(1) allegations that adverse action was motivated by protected concerted activity, just as it does to 8(a)(3) allegations of actions motivated by union activity." Id. at 325 fn. 15. Therefore, the principles deployed above to assess whether a causal relationship existed between Peters's initiation and leadership of the union drive and his rapidly ensuing discharge apply equally to assess whether a causal relationship existed between Roscoe's protected concerted activity and

the two disciplinary warning he received on August 21. Accordingly, to prove that Roscoe's protected concerted activity was a motivating factor in the warnings, the evidence must establish "(1) the employee's protected concerted activity, (2) the respondent's knowledge of that activity, and (3) the respondent's animus." Id. at 325. Once an unlawful motive is proven, the burden of persuasion shifts to the Respondent "to show that it would have taken the same action even in the absence of the employee's protected activity." Ibid.

**2. The General Counsel's Initial Showing**

**a. Roscoe's Protected Concerted Activity**

The ALJ concluded that Roscoe engaged in two forms of protected concerted activity that motivated his August 21, 2014 warnings (ALJD at 13). On July 29, 2014, Roscoe hand-delivered a letter to Spiller (ALJD at 4). On its face, the letter indicates that it is being sent on behalf of all of Respondent's black carmen and actually names those carmen—Roscoe, Carl Pinder, and Kim Bronson. The letter alleges that the Respondent favored white carmen over black carmen in deciding who to promote and in setting wage rates. The letter concludes: "We would like to schedule a meeting to discuss this situation with management tomorrow if possible. I appreciate you taking the opportunity to investigate and allow us to voice our concerns." (GC Exh. 21.) The ALJ concluded that Roscoe engaged in protected concerted activity by preparing and hand-delivering this complaint as the representative of Respondent's black carmen to voice a group concern among those carmen that Respondent was discriminating against them based on their race (ALJD at 13). This conclusion is endorsed by Board precedent. *Tanner Motor Livery, Ltd.*, 148 NLRB 1402, 1403-04 (1964), enfd. in relevant part 349 F.2d 1 (9th Cir. 1965). Moreover, Respondent did not except to the ALJ's conclusion that Roscoe's July 29 complaint of racial discrimination constituted conduct protected by the Act. This alone is enough to

establish that Roscoe engaged in protected concerted activity, the first element needed to prove unlawful motive.

### b. Respondent's Knowledge of That Activity

It is evident that Respondent knew that Roscoe protested Respondent's perceived discrimination based on race on behalf of all of Respondent's black carmen. Roscoe delivered the letter registering the protest to Spiller by hand. Furthermore, the day after Roscoe delivered the letter, Spiller instructed Roscoe, Pinder, and Bronson to come to his office to discuss the letter. During this meeting, the employees further explained their belief that Spiller was favoring white employees because they were white. In response, Spiller asserted that it was his prerogative to promote employees using whatever procedure he chose. Following the meeting with Spiller, Roscoe e-mailed a copy of the letter complaining of racial discrimination to Beasley. (ALJD at 4.) In short, Spiller and Beasley were aware that Roscoe complained of discrimination on behalf of black employees because Roscoe made those complaints directly to Spiller and Beasley.

### c. Respondent's Animus

#### i. Background

Finally, the ALJ concluded that Respondent bore animus toward Roscoe's accusations of racial bias. The evidence establishes that, on August 15, Roscoe stayed past the end of his shift because he was in the middle of finishing repairs to a car and needed to brief his relief on the repairs. Staying late when repairs remained unfinished in order to either finish the repairs or ensure that one's relief would finish them was standard practice—Roscoe himself had regularly done so in the past without incident. On this day, however, Roscoe's supervisor, Ryder, radioed Roscoe about forty minutes after Roscoe's shift ended demanding that Roscoe come to the

supervisor trailer, which Roscoe did. There, Ryder instructed Roscoe to stop working. Roscoe replied that he was in the midst of ensuring that a repair was completed, after which Ryder acceded to him staying until the repair was done. Roscoe ultimately put in for one hour of overtime. (ALJD at 7-8. 13-14.)

Five days later, on August 21, Ryder gave Roscoe two disciplinary warnings, both ostensibly for misconduct he engaged in on August 15 (Tr. at 292). One alleged that Roscoe sat in the employee trailer at a time when he should have been working (GC Exh. 26). The other alleged that Roscoe was insubordinate because he put in for 2.5 hours of overtime even though he was only authorized for 1 hour; the warning asserted that Roscoe put in the extra 1.5 hours of overtime for time spent eating and tidying up the employee trailer (GC Exh. 25). Ryder informed Roscoe that he was not the one who decided to issue the warnings and that the decision to do so came from above him (Tr. at 293-94). A few days later, Spiller informed Roscoe that he, Spiller, was the one who decided to issue Roscoe the warnings (Tr. at 298-99).

**ii. Timing**

The ALJ found that animus was established by the close timing between Roscoe's protected concerted activity and the warnings and by the pretextual nature of the Respondent's stated reasons for issuing the warnings. As to timing, Spiller ordered the issuance of the warnings to Roscoe roughly three weeks after Roscoe accused Spiller of discriminating against Roscoe and other black employees. Prior to August 21, Roscoe had never been disciplined or reprimanded (Tr. at 707-08). The temporal proximity between Roscoe's protected protest and his warnings suggests the former motivated the latter. E.g. *Schaeff*, 321 NLRB at 217.

### iii. Pretext

In addition, the ALJ found that the accusations of misconduct against Roscoe were fabrications (ALJD at 13-14). One warning was based on Spiller's claim to have observed Roscoe sitting in the employee trailer at a time when he should have been working (GC Exh. 26). Yet, no supervisor said anything to Roscoe about his supposed loafing at that time. Instead, the first time Roscoe heard about his purported loafing was in the warning he received six days later. As the ALJ explained, this version of events is simply not credible; it cannot reasonably be believed that a worksite's top supervisor (Spiller) personally observed an employee (Roscoe) loafing on the clock yet no action was taken to spur the employee to his duties. Therefore, the ALJ concluded that the accusation that Roscoe loafed was fabricated. (ALJD at 14.)

The ALJ similarly found that the allegations for which Spiller claimed to have issued the other warning—Roscoe's supposed insubordination by taking 2.5 hours of overtime when he was only authorized to take 1—were untrue. It would have been extremely easy for Spiller to find out how much overtime Roscoe put in for on August 15. Had he done so, he would have seen that Roscoe only put in for one hour, which the warning itself indicates was the authorized amount. (GC Exh. 25.) Yet, Spiller apparently either did not bother to perform this simple, dispositive check or did perform it and nevertheless plowed forward with the discipline knowing the falsity of the underlying allegations. The obvious and easily ascertained untruth of the allegations suggests that they were not the true reason for the discipline.

As explained above, "[i]t is well settled that when a respondent's stated reasons for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal." *Suburban*, 351 NLRB at 5. Here,

Spiller's stated reasons for issuing the warnings were demonstrably false, suggesting Spiller harbored an ulterior, unlawful motive for wanting to discipline Roscoe that he wished to hide.

In summary, the ALJ found that, only a few short weeks after Roscoe led a protest against perceived racial discrimination on the part of Spiller, Spiller invented reasons to issue Roscoe two disciplinary warnings. The ALJ correctly concluded that the evidence shows animus on the part of Respondent toward Roscoe's protected concerted protest against perceived discrimination. The evidence shows that Roscoe engaged in protected concerted activity, that Respondent knew about that activity, and that Respondent was hostile to that activity. The evidence therefore establishes that Roscoe's protected concerted activity was a motivating factor in his discipline.[10] E.g., *Amglo*, 360 NLRB at 325.

### 3. The Respondent's Affirmative Defense

In addition, because the nondiscriminatory reasons Respondent claims to have relied on in disciplining Roscoe were pretexts, Respondent necessarily cannot establish the affirmative defense that it would have disciplined Roscoe for those reasons notwithstanding his protected conduct. E.g., *Golden State*, 340 NLRB at 385; see also *Metropolitan*, 351 NLRB at 659 ("The question…is whether [the employer] has gone beyond merely articulating a legitimate reason for the discharge and shown by a preponderance of the evidence that it did, in fact, rely on that reason."). The ALJ correctly concluded that Respondent violated the Act by issuing two disciplinary warnings to Roscoe on August 21 because he engaged in protected concerted activity.

[10] In addition, the evidence of pretext and suspicious timing establishes a link between Roscoe's protected concerted activity and the August 21 warnings; the General Counsel does not rely on circumstances unrelated to Roscoe's protected concerted activity to establish animus. Therefore, even under Chairman Miscimarra's view of *Wright Line*, the evidence shows that Roscoe's protected concerted activity was a motivating factor in the warnings. See fn. 9, above.

### F. Roscoe's Suspension

The ALJ concluded that Respondent violated Sections 8(a)(3) and (1) of the Act by suspending Roscoe for 14 days because he was the leader of the effort to form a union, a mantle Roscoe picked up after the Respondent fired Peters (ALJD at 14-16). In ascertaining whether a causal relationship existed between Roscoe's leadership of the union drive and his suspension, the same principles used to evaluate Peters's discharge apply.

#### 1. The General Counsel's Initial Showing

##### a. Roscoe's Union Activity and Respondent's Knowledge of That Activity

The presence of the first two elements needed to prove that the Respondent suspended Roscoe because of his union activity—union activity by Roscoe and the Respondent's knowledge of that activity—are not disputed. Along with Peters, Roscoe initiated the effort among Respondent's employees to form a union. Peters contacted the union after he and Roscoe discussed the merits of collective bargaining in the employee trailer on August 21 (Tr. at 129-31). At the August 21 meeting with union representatives in the parking lot, Roscoe stood on a roughly three-foot high parking barrier and passionately extolled the virtues of being part of a union (Tr. at 135). As stated above, multiple supervisors witnessed this meeting and saw Roscoe stand on the barrier and give his speech to the assembled employees (ALJD at 8). In addition, Roscoe asked his co-workers to sign authorization cards both at the August 21 meeting and in the ensuing days (ALJD at 8; Tr. at 655). Again as already stated, supervisors witnessed Roscoe and Peters handing their co-workers authorization cards in the parking lot on August 24 and reported what they had seen to Spiller (Tr. at 655).

After Respondent discharged Peters on August 26, Roscoe was left as the sole leader of the attempt to organize Respondent's employees into a union. On September 2, Roscoe went

with the Union's president, Jim Savage, to the National Labor Relations Board to file a petition for an election to determine whether the employees wished to be represented. That same day, Roscoe delivered a copy of the filed petition to Spiller by hand. (Tr. at 360-63.)

In summary, along with Peters, Roscoe was the chief proponent of Respondent's employees organizing into a union. After Respondent terminated Peters, Roscoe became the principal champion of unionization among the employees. The Respondent was keenly aware of Roscoe's role.

### b. Respondent's Antiunion Animus

The ALJ concluded that the record established that Respondent was hostile to its employees forming a union. A variety of factors support the ALJ's conclusion.

#### i. Respondent's Unlawful Interference With Its Employees' Decision Whether to Form a Union

As with Peters's discharge, Respondent's multiple unfair labor practices designed to defeat the union drive demonstrate its animus toward unionization and, accordingly, to Roscoe's advocacy of unionization. See, e.g., *St. Margaret*, 350 NLRB at 203.

#### ii. Timing

In addition, as noted by the ALJ, the timing of Roscoe's suspension suggests animus. Respondent suspended Roscoe pending investigation on September 23, a mere ten days before employees were scheduled to begin voting on whether to unionize on October 3. On the afternoon of October 2, fewer than 24 hours before the unionization vote was to commence, Respondent instructed Spiller to come to the worksite for a meeting with Spiller and Nate Henderson. (ALJD at 14-15.) The meeting lasted roughly a minute (Tr. at 349) and consisted of Spiller handing Roscoe a notice that Respondent was suspending him for fourteen days retroactive to September 23 (ALJD at 15). The notice specified that the last day of Roscoe's

suspension would be Monday, October 6—two days after voting ended on October 4 (the election lasted two days) (GC Exh. 34). Thus, ten days before employees were to vote on whether to form a union the Respondent suspended the leading proponent of unionization, ordered his appearance at the worksite hours before voting began to hand him a notice, and set the end of his discipline for just after employees finished voting (when it would be too late for Roscoe to whip support for the union or monitor Respondent's campaign against unionization). This timing raises an inference that Roscoe's role as chief employee organizer motivated his suspension. E.g. *Schaeff*, 321 NLRB at 217.

### iii. The Pretextual Nature of Respondent's Stated Reasons for Suspending Roscoe

*Respondent's Investigation Did Not Support the Allegations Against Roscoe*

Furthermore, the evidence reveals Respondent's stated reasons for suspending Roscoe to be pretextual. Respondent claims to have suspended Roscoe because, on September 23, Roscoe had an altercation with coworker Joe Onuskanych during which he made an obscene gesture and subsequently was insubordinate to supervisor Lockley (GC Exh. 34). However, as noted by the ALJ, Respondent's investigation did not support its allegations against Roscoe (ALJD at 16). Respondent collected statements from a number of employees regarding the argument between Roscoe and Joe Onuskanych (R.Exhs. 8, 10-15). Of these, the only person who corroborated Joe Onuskanych's version of events was his father, Mike Onuskanych, whom the record does not show even witnessed Roscoe make the alleged obscene gesture. Mike Onuskanych's written statement and the report of his interview with Respondent's human resources representative are ambiguous as to whether he actually witnessed Roscoe make the obscene gesture or was just reporting what he was told by someone else (most likely his son, Joe), and Respondent did not call Mike Onuskanych as a witness to clarify this issue (R. Exhs. 8, 14).

Meanwhile, employees John C. Peters, Jr., Horne, and Greg Baranyay—the three employees with the least reason to dissemble regarding what they saw because they did not have a personal stake in the investigation nor any familial or other special relationship with either involved employee—contradicted Joe Onuskanych's version (R. Exhs. 8, 10, 15). Each of these employees did not see Roscoe make an obscene gesture. Each asserted that Joe Onuskanych and Roscoe insulted each other and shared blame for the argument. And each indicated that the argument was not a significant event. In fact, Baranyay expressed confusion about why Respondent suspended Roscoe (R. Exh. 8). Notwithstanding the results of its investigation, Respondent suspended Roscoe for fourteen days, adopted Joe Onuskanych's version of events without amendment, and took no disciplinary action against Joe Onuskanych of any kind despite his role in the argument. The gulf between what Respondent's investigation revealed and the conclusions it supposedly drew suggests it was using Roscoe's argument with Onuskanych as an excuse to eject the chief employee organizer from its workplace just before the election.

*Disparate Treatment*

That Respondent's stated reasons for suspending Roscoe were not its true reasons is further bolstered by the fact that it had reacted to other incidents of employees insulting or even threatening violence against other employees with indifference. Thus, as discussed with regard to Peters's discharge, Respondent took no disciplinary action of any kind against Leroy Henderson when he used extremely profane language to insult and even threaten violence against Peters (ALJD at 5; GC Exh. 20). In addition, Leroy Henderson arrived at the workplace inebriated hours after his shift was supposed to start then flatly refused his supervisor's instruction to meet with Peters and the supervisor to discuss Henderson's attack on Peters—conduct that plainly constituted insubordination—yet the Respondent did not discipline

Henderson for this either (ALJD at 5). Respondent's disparate treatment of Roscoe and Henderson suggests that Roscoe's leadership of the union drive was the true motive for his suspension. E.g., *Lucky Cab*, 360 NLRB at 274.

Respondent reacted with similar lack of concern to a signed statement from employee Carl Pinder that supervisor Gary Plotts told a group of employees on September 5, 2014 to commit physical violence against Roscoe because he made safety complaints and thereby put employees' jobs in jeopardy (GC Exh. 31). Roscoe relayed Pinder's statement to Respondent (GC Exh. 32; Tr. 313). There is no evidence that Respondent disciplined Plotts or even investigated his statement.

In addition, on August 28, Joe Onuskanych smeared a sweatshirt bearing a union emblem that Roscoe had worn to work and momentarily set on a chair in the employee trailer with oil, ruining it, and turned the sweatshirt around to hide the union emblem. When Roscoe reported this to Spiller and Lockley and showed them the ruined clothing, Spiller scolded Roscoe for not putting his things in a locker and sarcastically promised to buy Roscoe another sweatshirt. Joe Onuskanych was not disciplined. (Tr. at 330-31.)

Collectively, these incidents show that Respondent did not discipline employees even when they leveled intensely vitriolic language (in the case of Henderson) or threats of violence (in the case of Henderson and Plotts) against one another, acted insubordinately (in the case of Henderson), and deliberately destroyed one another's property (in the case of Onuskanych). The Respondent took a lackadaisical approach toward employee arguments. The fact that it inexplicably suspended Roscoe for fourteen days for such an argument shows that this was not its true motive. *Superior Coal*, 295 NLRB at 451-52, 452-53.

*Conclusion as to Pretext*

The incongruity between the Respondent's investigations and its conclusions as well as between its treatment of past comparable instances of misconduct and Roscoe's supposed misconduct establishes that this purported misconduct was an excuse to conceal Respondent's true motive for suspending Roscoe.[11]

#### 2. Respondent's Affirmative Defense

In addition, because Respondent's stated reasons for suspending Roscoe were pretextual, Respondent necessarily cannot establish as an affirmative defense that it in fact relied upon those reasons in issuing the suspension. *Golden State,* 340 NLRB at 385.

### G. Roscoe's Discharge

#### 1. The General Counsel's Initial Showing

##### a. Roscoe's Union Activity and Respondent's Knowledge of That Activity

Finally, the ALJ concluded that Respondent violated the Act by discharging Roscoe because of his union activity (ALJD at 17). The first two elements of *Wright Line* are established for the same reasons they were established with regard to Roscoe's suspension. Roscoe was the principal proponent of Respondent's employees forming a union, and Respondent knew that.

##### b. Respondent's Animus

###### i. Other Unfair Labor Practices and Timing

That Respondent harbored animus toward Roscoe's union activity is established by several factors. As with the Respondent's other discriminatory actions, its animus toward

[11] Because the evidence reveals that Respondent was hostile to the particular protected conduct engaged in by Roscoe and because there are links between Roscoe's union activity and his discipline, the General Counsel made his initial showing even under Chairman Miscimarra's view of *Wright Line.* See fn. 9, above.

Roscoe's leadership of the union drive is shown by its multiple unfair labor practices intended to defeat that drive. E.g., *St. Margaret*, 350 NLRB at 203. In addition, Respondent discharged Roscoe only a few days after employees voted against forming a union (the last day of voting was October 4 and Respondent notified Roscoe he was discharged on October 11). The close proximity between the election, which Roscoe was to a large extent responsible for bringing about, and Roscoe's termination further establishes that the Respondent was motivated to discharge Roscoe by his union activity. E.g., *B. J. & R. Machine Co.*, 270 NLRB 267, 269 (1984) (finding it significant that "the layoffs of the three known union activists occurred shortly after the Union lost the election").

**ii. Pretext**

Finally, Respondent's cursory investigation into the misconduct for which it supposedly discharged Roscoe reveals the misconduct to have been a pretext. Respondent claimed that it discharged Roscoe for making profane comments and threats toward Leroy Henderson as the two passed one another in their cars on October 9 (GC Exh. 39). Respondent learned of this alleged incident when Leroy Henderson told his supervisor as well as Howard and Nate Henderson about it (R. Exh. 16). Respondent instructed Leroy Henderson to write a statement regarding what happened (Tr. at 631, 676). Someone from Respondent spoke with someone from PES (the company for which Respondent provided rail services) to discuss Henderson's allegations, and PES solicited a written statement from a PES employee who was in the car with Henderson as to what had occurred, which PES then sent to Respondent (Tr. at 676, R. Exh. 17). In addition, Spiller testified that PES told Respondent it would suspend Roscoe's access to the PES property "pending [Respondent's] outcome of what [Respondent's] decision was" (Tr. 676). There is no evidence that Respondent inquired about the PES employee's relationship to

Henderson and why she was in Henderson's car. Nor is there any evidence that Respondent asked Henderson or the PES employee or anyone else what reason Roscoe could possibly have had to engage in unprompted profane insults and threats against Henderson.

The next morning (morning of October 10), Spiller, Nate Henderson, and Howard talked to Respondent's legal counsel about the allegations against Roscoe. There is no evidence as to why the managers wanted to consult with an attorney. (Tr. at 676-77.) When Roscoe reported for work on October 10, a supervisor immediately escorted him off the property (Tr. at 363-64). Then, on October 11, Respondent e-mailed Roscoe a letter informing him that he was fired (Tr. at 364-65; GC Exh. 39).

Respondent never asked Roscoe about the allegations against him, nor did it conduct any additional investigation beyond that already mentioned (ALJD at 17). Its explanation for why it did not do so is a demonstrable fabrication. Respondent asserted that "[s]ince Roscoe was not permitted by PES to be on their property, Watco did not have any opportunity to question Roscoe in person or to inform Roscoe of his termination in person in the presence of a Human Resources representative as it had with Peters" (R. Br. 36). First, Spiller never said PES banned Roscoe from their property; instead, he testified that someone from PES told someone from Respondent that it would suspend Roscoe's badge allowing him to access PES property "pending [Respondent's] outcome of what [Respondent's] decision was" (Tr. 676). Therefore, Spiller himself testified that PES was deferring to Respondent's judgment as to how to handle the situation, not insisting that Roscoe never enter the property again. Moreover, obviously, Respondent could have interviewed Roscoe about the accusations against him remotely, via phone, e-mail, text message, videochat, or any number of ways. Indeed, Beasley conducted

Respondent's entire investigation into Pettiford's complaints against Peters by phone and ostensibly relied on that phone investigation to fire him (Tr. at 569).

Respondent's lack of interest in learning the truth of what happened between Henderson and Roscoe and its demonstrably untrue assertions as to why it failed to conduct even a basically adequate investigation give rise to an inference that Respondent harbored an ulterior, unlawful motive for discharging Roscoe that it did not want to state openly. See, e.g., *Joseph Chevrolet, Inc.*, 343 NLRB 7, 17 (2004), enfd. per curiam 162 Fed.Appx. 541 (6th Cir. 2006).

In addition, as stated already, Respondent failed to discipline other employees who engaged in threats of violence against their colleagues but were not union leaders. Specifically, it took no discipline against Leroy Henderson himself for threatening violence against Peters via text on August 1, nor did it discipline or even bother to investigate Plotts for encouraging employees to assault Roscoe to retaliate against him for complaining about perceived unsafe conditions. Its disparate treatment of comparable accusations against Roscoe further demonstrates an ulterior motive for discharging him.[12]

The evidence therefore establishes the elements needed to prove that Roscoe's union activity was a motivating factor in his discharge.[13]

[12] Finally, as noted by the ALJ (ALJD at 17), the Respondent told Roscoe that it discharged him because he had received the two disciplinary warning on August 21 and the suspension from September 23 through October 6 (GC Exh. 39). For the reasons already discussed, these earlier disciplines were themselves discriminatorily motivated. Respondent's discharging Roscoe based on unlawfully issued prior discipline is an independent reason the discharge was unlawful. *Dynamics Corp.*, 296 NLRB 1252, 1254 (1989), enfd. 928 F.2d 609 (2nd Cir. 1991).

[13] The General Counsel made his initial showing even under Chairman Miscimarra's view of *Wright Line*. See fn. 9, above.

### 2. Respondent's Affirmative Defense

As already explained, Respondent's perfunctory investigation of Roscoe's purported misconduct (including its failure to even ask Roscoe himself what happened), its disparate treatment of Roscoe's alleged misconduct relative to comparable misconduct by employees not active in the organizing drive, and the evident falsity of its explanation for the deficiencies in its investigation all combine to show that it did not truly rely on Roscoe's alleged misconduct in firing him. Therefore, by definition, Respondent cannot establish the affirmative defense that it did rely on that misconduct. *Golden State*, 340 NLRB at 385; see also *Metropolitan*, 351 NLRB at 659.

## V. CONCLUSION

For the foregoing reasons, Respondent's exceptions to the ALJ's decision are without merit. The General Counsel therefore respectfully requests that Respondent's exceptions be rejected in their entirety.

Respectfully submitted,

/s/ Mark Kaltenbach

Counsel for the General Counsel
National Labor Relations Board, Region 4
615 Chestnut Street
Suite 710
Philadelphia, Pennsylvania 19106-4413

Dated: June 14, 2017